UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JENNIFER FRANET, Plaintiff(s), v. COUNTY OF ALAMEDA SOCIAL SERVICES AGENCY, et al., Defendant(s).	No. C 02-3787 MJJ (BZ) **REPORT AND RECOMMENDATION TO DENY DEFENDANTS' MOTION FOR ATTORNEY'S FEES**

On May 22, 2006, defendants Joan Hintzen and the County of Alameda Social Services Agency ("the County")[1] moved for an award of $204,762.96 in attorney's fees pursuant to 42 U.S.C. § 1988, which provides that the court, in its discretion, may grant the prevailing party in federal civil rights actions a reasonable attorney's fee. By order dated May 25, 2006, the Honorable Martin J. Jenkins referred their motion to me for a report and recommendation.

While a prevailing plaintiff may recover attorney's fees

[1] Because a jury awarded $220,000 in compensatory damages against defendant Karen Castro, she is not a prevailing party and is not moving for attorney's fees.

unless "special circumstances" make the award unjust, a prevailing defendant may only recover fees if the claim was "frivolous, unreasonable or groundless" and not simply because plaintiff lost. Hughes v. Rowe, 449 U.S. 5, 14 (1980)(applying Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 422 (1978) to civil rights actions under 42 U.S.C. § 1983). Courts should avoid post hoc reasoning in making this decision since "[t]his kind of hindsight logic could discourage all but the most airtight claims" and "no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable." Christiansburg, 434 U.S. at 421-22. See also Hughes, 449 U.S. at 14.

Defendant Hintzen seeks fees because she was granted summary judgment. Hintzen prevailed not on the merits but because she was found immune from the suit. This could complicate the analysis of her entitlement to fees. As the Supreme Court noted in Saucier v. Katz, 533 U.S. 194, 200-01 (2001), qualified immunity is an immunity from suit, not a defense to liability, and can be "effectively lost" if not properly and timely decided. While governmental defendants frequently assert immunity, they sometimes do not or do not do so properly. Plaintiff had no way of knowing whether her claim would be resolved on the merits or whether Hintzen would properly seek immunity. Inasmuch as neither side has briefed

this issue, I will not reach it.[2]

Even after Hintzen asserted her immunity it was not clear she would be entitled to it. The law as to the liability of social workers for removing and retaining children was evolving. Plaintiff's counsel concluded that while some of Hintzen's actions were subject to absolute or qualified immunity, the actions that plaintiff was challenging were not.[3] These were Hintzen's 1) failure to release the children between the time of their removal and the time of the dependency petition; 2) restriction of telephone and in-person contact between plaintiff and her children following the

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[2] At least one court has stated that a plaintiff should assume that a defendant would assert an immunity from trial in evaluating whether a lawsuit was reasonable for purposes of awarding defendants attorney's fees under § 1988, albeit without explanation as to why this should be so. See Galen v. County of Los Angeles, 322 F.Supp.2d 1045 (C.D. Cal. 2004). That the officers in Galen would be entitled to qualified immunity was much clearer than it was in this case. In any event, I do not find Galen persuasive to the extent that it holds that a plaintiff who files a civil rights action involving an area of law where the rights are not clearly established should be liable for attorney's fees because plaintiff had to know that if the right is not clearly established, the officer would be entitled to immunity. First, as noted above, it is not clear that at the time of filing plaintiff could be certain that defendants would assert immunity. More importantly, I question whether Galen is consistent with the policy of §§ 1983 and 1988, to encourage vigorous enforcement of civil rights laws. Plaintiffs will be reluctant to clearly establish any right if they know that their first attempts, which will be lost because the right has not yet been clearly established, will result in the imposition of attorney's fees.

[3] "It is well-settled that the immunity to which a public official is entitled depends not on the official's title or agency, but on the nature of the function that the person was performing when taking the actions that provoked the lawsuit." Mabe v. San Bernadino County, 237 F.3d 1101, 1106 (9th Cir. 2001)(citation omitted).

dependency hearing; and 3) access to plaintiff's medical records without judicial authorization, without valid consent, and in the absence of due process. Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment ("SJ Order") 7:1-6.

Judge Jenkins held that Hintzen's actions in obtaining plaintiff's medical records were investigative and sufficiently connected to the judicial process to be protected by absolute immunity. As for Hintzen's other actions, Judge Jenkins concluded that because the scope of absolute immunity is narrow and Hintzen's actions were not connected to the judicial process, she was not entitled to absolute immunity. Id. at 5:23-27. He then ruled that Hintzen was entitled to qualified immunity for her pre-hearing detention actions because they were similar to the social worker's actions in Doe v. Lebbos, 348 F.3d 820 (9th Cir. 2003). Finding that Hintzen reacted to a reasonable belief of imminent danger to the children, the court held she did not commit any constitutional violations relating to the pre-hearing detention. SJ Order 8:7-12. Judge Jenkins also found that restricting a parent's telephone contact with children in protective custody did not violate a constitutional right and even if it did, it was not a clearly established constitutional right. Id. at 9:3-8. These immunity issues involved complex analysis and reasoning, requiring briefing, research and argument. Without the benefit of these, it might not have been clear to plaintiff that her claims against

Hintzen would fail because of immunity.[4] Plaintiff's case against Hintzen was not frivolous, unreasonable or without foundation. Therefore, I recommend that Hintzen's motion be denied.

Next, the County asserts that plaintiff did not have sufficient support for her claims against the County. However, in determining the merits of a lawsuit, courts must resist post hoc reasoning. Christiansburg, 434 U.S. at 422. It is impermissible to conclude that because a plaintiff did not prevail, her lawsuit must have been unreasonable or without foundation. Id. If neither party could have predicted with absolute confidence the outcome of the case, the action cannot be called frivolous and awarding attorney's fees to the defendant would be inappropriate. Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295, 1301 (9th Cir. 1981).

At the time of the filing of the complaint, it was not unreasonable for plaintiff to have believed that Castro and Hintzen must have acted pursuant to a practice or policy of the County. Their actions in removing the children without a warrant, detaining them under the circumstances alleged and obtaining medical records are not the sort of actions that a plaintiff would assume that a social worker would take as a personal lark or in contravention of established policies or practices. The County seemed to recognize this at the hearing

[4] Defendants' reliance on Walker v. NationsBank of Florida N.A., 53 F.3d 1548, 1559 (11th Cir. 1995) is misplaced. Whatever the merits of the Walker test, the Ninth Circuit has not adopted it and I do not find it useful in this case.

when its argument shifted to one that plaintiff should have dismissed the claim once she had taken discovery. As a result of that discovery, the County was denied summary judgment on the Monell claim with respect to some of the challenged actions but not with respect to others. Given the nature of Hintzen's conduct, I cannot conclude that either the filing of the Monell claim or its continuing prosecution were "frivolous, unreasonable, or groundless" such that an award of attorney's fees against plaintiff is appropriate to deter the filing of similar actions.[5] As the Ninth Circuit stated in reversing a defendants' fee award, "[w]hen it enacted § 1988, Congress intended to promote, not to discourage, vigorous enforcement of federal civil rights laws." Jensen v. Stangel, 762 F.2d 815, 818 (9th Cir. 1985).

For the reasons stated above, I recommend that defendants' motion for attorney's fees be **DENIED.**

Dated: September 26, 2006

Bernard Zimmerman
United States Magistrate Judge

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[5] Myers v. City of West Monroe, 211 F.3d 289 (5th Cir. 2000), in which an award of attorney's fees to some defendants was affirmed but an award to other defendants was reversed, is distinguishable. Factually, Myers complained about a traffic stop and an allegedly illegal search of a car, a far cry from removal and detention of children. Procedurally, all defendants in Myers prevailed whereas plaintiff here obtained a substantial jury verdict against one of the defendants. Legally, Myers applied the Walker analysis which, as noted in footnote 4, is not the law of this Circuit.